APPENDIX C

[Filed Oct. 22, 2001]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFTON MAXWELL, Petitioner, **vs.** **ERNIE ROE, Warden,** Respondent.	Case No. EDCV01-0131-VAP(RZ) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California, the undersigned submits this Report and Recommendation to the Honorable Virginia A. Phillips, United States District Judge. The undersigned recommends that the Court deny the Petition and dismiss the action with prejudice.

I.

PROCEEDINGS

On January 30, 1998, in a joint trial in Riverside County Superior Court involving three defendants and two juries, the jury assigned to Petitioner Clifton Maxwell convicted him of first degree murder (CAL. PENAL CODE § 187(a)). Reporter's Transcript ("RT") 1697; Clerk's Transcript ("CT") 954, 963. Petitioner received a prison sentence of twenty-five years to life. CT 996.

Petitioner appealed. He claimed that the trial court erred in (1) finding him mentally competent to stand trial without holding a second competency hearing; (2) requiring him to wear an electric-shock belt as a condition of his being present at trial after repeated prior disruptions of courtroom proceedings; (3) ordering that Petitioner be medicated involuntarily, without first conducting a hearing on the matter. Lodgment 9 (Opening Brief on appeal). Before receiving a ruling, he petitioned the same court for a writ of habeas corpus, asserting the second and third claims contained in his appeal. The California Court of Appeal affirmed on October 8, 1999 in an unpublished opinion that also denied the habeas petition. Lodgment 1. The same appellate court denied another petition for habeas relief on December 14, 1999. Lodgments 7 & 8. The California Supreme Court denied direct review on January 19, 2000 without comment. Finally, Petitioner sought habeas relief in the state Supreme Court, adding a fourth claim similar to his other claims: that the trial court's finding that he had voluntarily absented himself from trial proceedings was error, because (he asserts) it was also error to condition his presence on wearing the electric shock belt and because he was involuntarily medicated at the time. That court denied his petition without comment on July 26, 2000. Lodgments 2, 4, 5 & 6.

In the instant petition, filed on February 20, 2001, Petitioner raises the same claims he presented in California's courts.

II.

FACTUAL SUMMARY

In affirming Petitioner's conviction, the California Court of Appeal made certain factual findings regarding the circumstances underlying Petitioner's conviction. Lodgement 1 at 2-4. Petitioner has failed to rebut these findings with clear and convincing evidence. The findings therefore are presumed to be correct. 28 U.S.C. § 2254(e)(l); *Bragg v. Galaza,* 242 F.3d 1082, 1087 (9th Cir. 2001) (presumption applies to findings of state appellate courts as well as trial courts). These findings are summarized as follows:

> On December 27, 1994, defendant Maxwell learned that his car, a white Chevrolet Monte Carlo, was missing from his stepfather's garage, where the car had been parked.
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> In a first attempt to recover the car, defendant Maxwell, Timothy Potts (Potts), and two others went armed to Eugene Miller Bender's house, in the belief that the car was located there. The car was not there, but some gunfire occurred, and a man named David Jackson (Jackson) was shot but not killed.
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> Next, on December 29, 1994, Maxwell called Potts and said he had found the car. He asked Potts to obtain a tow truck. Then five men - including defendants Maxwell, Moore and Mark Camilloe Baker (Baker), Basil Chad Maxwell (Basil), and Potts - drove in two vehicles to the residence of Jerry Jefferson (Jefferson). Potts, Moore and Baker were armed.
>
> Jefferson came out of the house to meet Potts. Jefferson was cooperative and did not object to the

> car being taken. Nevertheless, Moore hit him with a rifle barrel and two shots were fired at Jefferson as he ran toward the house. Potts found the missing car, without wheels, in the garage. Potts heard more shots from the house, where he saw Moore and Baker shooting at something Potts could not see. Finally, Potts left the scene with the others.
>
> Baker testified that he saw Moore and Jefferson wrestling over a shotgun and then heard a shot.
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> Jefferson was found dead in his bedroom. He had been shot four times, twice each from two weapons of different calibers.

Lodgment 1 at 3-4.

III.

COMPETENCE TO STAND TRIAL

The procedural history underlying Petitioner's competence claim – specifically, that the trial court erred in finding him mentally competent to stand trial and that it should have held a second competence hearing, *see* Petition at 7 – relates closely to his other claims, and the Court thus considers it first. The state courts rejected it on its merits. It is unconvincing.

Because Petitioner filed his habeas petition after April 24, 1996, it is subject to deferential review standards established in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as to claims that the California courts rejected on the merits, including this claim. See *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 532 (9th Cir. 1998) (en banc). Under the AEDPA, the Court may reverse a state court's decision denying relief only if that decision either (1) is contrary

to, or involves an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) is based on an unreasonable factual determination based on the state record. 28 U.S.C. § 2254(d); see *Williams v. Taylor*, 529 U.S. 362, 402-13 (2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir.), *cert denied*, 531 U.S. 944 (2000).

In conducting its review, this Court looks to the explicated decision of the California Court of Appeal, rather than one-line state Supreme Court orders denying the same claims. "[W]here there has been one reasoned state court judgment rejecting a federal claim, [federal courts sitting in habeas should presume that] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991).

The Court of Appeal summarized and found the following rather complex facts underlying the competence issue, which findings Petitioner has not rebutted with clear and convincing evidence:

> In May 1996, pursuant to Penal Code section 1368, defense counsel requested a hearing to determine Maxwell's mental competency to stand trial. Five psychiatrists evaluated Maxwell. Four found him to be competent and one did not. On December 16, 1996, the trial court found defendant competent to stand trial and reinstated criminal proceedings.
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> In January 1998, defense counsel informed the court several times that he was concerned about defendant's ability to stand trial because he was deteriorating, he was housed in the jail's psychiatric unit, and he was not communicating with defense counsel. The court was informed by a sheriff's

deputy that defendant was the subject of numerous Welfare and Institutions Code section 5150 evaluations and that he was refusing his antipsychotic medication.

The court concluded defendant was malingering and trying to feign a psychotic mental state. The court refused to suspend proceedings.

Later defense counsel said that defendant was on suicide watch and would not cooperate to allow his attorney to prepare an opening statement. The court announced that defendant had been found in possession of a razor blade and transferred to the hospital for a 72-hour evaluation under Welfare and Institutions Code section 5150. The court still found defendant was a malingerer and feigning mental illness. It further found that no Penal Code section 1368 defense motion was pending, that defendant was competent to stand trial, and [that] defendant was excusing himself from trial pursuant to Penal Code section 1043.[1]

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1. This section states in pertinent part:

> (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.
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> (b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:
>
> (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists

> Defendant resisted coming to court, was disruptive, and refused to wear the REACT [electric shock] belt. At one point, pursuant to Welfare and Institutions Code section 5250, he was certified by two psychiatrists for a 14-day hold at the hospital. But, in spite of his condition, defendant's doctors continued to release him to appear in court. Defense counsel declined to request a second competency hearing pursuant to Penal Code section 1368. The trial court continued to find that defendant was malingering and was competent to stand trial.

Lodgment 1 at 4-5.

The appellate court next explained its rejection of his claim:

> On appeal, defendant Maxwell argues that the court erred in not reassessing his competency to stand trial in January 1998. It violates . . . due process to convict an incompetent person. (*People v. Hale* (1988) 44 Cal. 3d 531, 539, [244 Cal. Rptr. 114, 119,] citing *Pate v. Robinson* (1966) 383 U.S. 375, 377.) . . . If a defendant has already been determined to be competent [after coming forward with evidence of incompetence and receiving a hearing pursuant to CAL. PENAL CODE section 1368], the trial court need not suspend proceedings to conduct a second competency hearing unless it is presented with evidence of a substantial change in circumstances or with new evidence casting serious doubt upon the

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> on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.

validity of the previous finding of competency. (*People v. Medina,* [11 Cal. 4th 694, 734, 47 Cal. Rptr. 26 165, 186 (1995)]; *People v. Jones* (1997) 15 Cal. 4th 119, 150 [, 61 Cal. Rptr. 2d 386, 404], overruled on another point by *People* v. *Hill* (1998) 17 Cal. 4th 800, 823, fn. 1.)

Here, in order to show a change of circumstances or new evidence, defendant relies primarily upon information contained in a "Notice of Certification," pursuant to Welfare and Institutions Code section 5250, dated January 15, 1998. That notice, however, was not part of the record below. Defendant attempts to make it part of the record by a request for judicial notice[, but we] deny the request for the several reasons stated in the People's opposition. . . . Therefore, [as to] the 'Notice of Certification," we reject his arguments that the trial court was presented with a change of circumstances or new evidence.

Defendant also argues that changed circumstances or new evidence was shown by . . . (1) repeated Welfare and Institutions Code section 5150 evaluations and (2) the concerns expressed by defense counsel about defendant's ability to cooperate with or contribute to his defense. In *People v. Medina*, *supra*, 11 Cal. 4th at pp. 734-735, the court held that cursing and disruptive conduct, affirmative efforts to appear psychotic, and unwillingness to participate in one's own defense do not constitute substantial evidence necessitating a second competency hearing. Furthermore, where defense counsel expressly refuses

> to question defendant's competency, there is no substantial evidence to justify a second competency hearing. (*Adams v. Wainwright* (11th Cir. 1985) 764 F.2d 1356, 1360.)

Lodgment 9 at 5-7.

The Fourteenth Amendment's Due Process Clause bars states from trying an incompetent person. Courts thus must ensure, throughout a trial and not merely at the beginning of a trial, that a defendant not be tried further if he lacks the mental capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in his defense. *Drope v. Missouri*, 420 U.S. 162,180-81 (1975). A state must provide reasonable procedures for determining a defendant's competence. *See Odle v. Woodford*, 238 F.3d 1084, 1087 (9th Cir. 2001). A trial judge must conduct a competency hearing whenever the evidence raises a "bona fide doubt" about the defendant's competence to stand trial, even if defense counsel does not ask for one. *Odle*, 238 F.3d at 1087 (*citing Pate v. Robinson*, 383 US. 375, 386 (1966)). Federal courts assessing habeas petitions thus review the record to determine whether evidence before the state trial court raised such a "bona fide doubt" so as to require a "*Pate* hearing." *Odle*, 238 F.3d at 1107 (*citing Pate*, 383 U.S. at 386).

But such habeas review is not *de novo*. Relief is available only if the state adjudication (1) is contrary to, or unreasonably applied, federal law as determined by the Supreme Court, or (2) stands upon an unreasonable factual finding in light of the evidence. 28 U.S.C. § 2254(d)(1),(2). Here, in analyzing whether any bona fide doubt existed so as to mandate a second hearing on Petitioner's competence, the state courts relied upon *Hale*, which expressly relied upon *Pate*. As a matter of AEDPA analysis,

> their determination therefore was not 'contrary to' clearly established Supreme Court precedent. But the decision that the evidence did not require a *Pate* hearing could be either an 'unreasonable application' of *Pate* . . . or 'an unreasonable determination of the facts in light of the evidence presented' in state court. . . . Because the Supreme Court has treated the question of whether a competency hearing is required as an issue of fact, *see Maggio* [*v. Fulford*], 462 U.S. [111,] 117 [(1983)] . . . , we are inclined to analyze the state court's decision as a potentially unreasonable determination of the facts.

Odle, 238 F.3d at 1107.

The *Odle* court next turned to the underlying evidence in that case, which involved a refusal to grant an *initial* hearing under *Pate*. In the instant case, however, the dispute centers on the trial court's refusal of a second hearing, and greater deference to the determination below thus may be required. Where a state court has held a *Pate*-type competency hearing, its finding that a defendant is competent notwithstanding the "doubts" that led to that hearing is entitled to a presumption of correctness. *See Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (rejecting habeas claim that petitioner was not competent to enter a guilty plea) ("A federal court may not overturn such determinations unless it concludes that they are not 'fairly supported by the record.'") (citation omitted); *Brewer v. Lewis*, 989 F.2d 1021, 1027 (9th Cir. 1993) (*following Baal*) (relying, in part, on reports submitted by psychologists to uphold trial court).

An instructive and similar case is *Amaya-Ruiz* v. *Stewart*, 121 F.3d 486 (9th Cir. 1997), cert. denied, 522 U.S. 1130 (1998), in which, prior to trial, the trial judge had two psychologists examine the petitioner and submit reports. Both found Amaya-Ruiz competent, and both suggested he was

faking a mental illness. Based on those reports, the trial judge found the petitioner competent and resumed criminal proceedings. Amaya-Ruiz later sought habeas relief on the grounds that his subsequent, increasingly uncooperative behavior should have required an additional competency hearing. The Ninth Circuit, noting that its review included "only the information that was before the state trial court at the time," compared the petitioner's behavior after the first competency-hearing evaluations with the behavior noted in those very evaluations. In essence, the evaluations had concluded that Amaya-Ruiz may have had some mental problems but was competent, though likely malingering so as to accentuate his difficulties, and affirmatively choosing not to cooperate. *Id.* at 488-90. After the initial hearing, Amaya-Ruiz behaved worse. He interrupted court proceedings loudly on numerous occasions, reportedly attempted suicide at the jail, and was uncooperative in coming to court from jail. *Id.* at 491. "These events," the Ninth Circuit wrote.

> were insufficient to [create] a bona fide doubt as to Amaya-Ruiz's competency. . . . The [prior] evaluations suggested Amaya-Ruiz was malingering and had chosen a strategy of non-cooperation. His behavior and statements that he did not understand the proceedings are consistent with a strategy of non-cooperation. . . .
>
> The evidence also indicates Amaya-Ruiz did not have a history of erratic behavior. [Witnesses] testified at trial that Amaya-Ruiz's behavior has been normal while he was living on the ranch. And, as noted by the district court, Amaya-Ruiz was capable of behaving appropriately before the jury and did not engage in any inappropriate conduct before the jury.

121 F.3d at 491-02. Similarly, Amaya-Ruiz's courtroom outbursts and subsequent removal from court during part of the

proceedings was not grounds for a second competency hearing. Such behavior was consistent with the prior evaluations suggesting he "may have been faking incompetence and may have chose to pursue a strategy of non-cooperation." *Id.* at 492. The Ninth Circuit was similarly unpersuaded by Amaya-Ruiz's reference to being prescribed various psychotropic medications while in custody. *Id.* at 492-93. Finally, *Amaya-Ruiz* refused to consider a number of factual arguments presented by the petitioner on the grounds that he had not presented them in the trial court. *Id.* at 493 (*citing United States v. Lewis*, 991 F.2d 524, 527 (9th Cir. 1993)).

Based on the evidence available to the trial court in the instant case, this Court finds (1) the trial court's conclusion is "fairly supported by the record" and thus is presumed correct, *Baal, supra*, 495 U.S. at 735; and (2) Petitioner has not rebutted that presumption, for reasons similar to those discussed in *Amaya-Ruiz*. Four of the five psychologists whom the trial court appointed in 1996 found him competent. All four concluded Petitioner was malingering by various means, including faked hallucinations and other behavior, and feigned ignorance of various trial procedure issues. Significantly, two of these four had initially reported that they believed Petitioner to be incompetent. Both soon reversed that opinion vigorously, however, when presented with evidence contradicting Petitioner's show of an inability to cooperate, to behave, or to provide information in a way that would permit him to assist in his defense. This evidence included a detailed letter written by Petitioner to an investigating detective, and audiotapes of Petitioner speaking much more coherently with police detectives than he had spoken with the examining psychologists. *See* Petition, Ex. F. One of the two briefly-fooled psychologists, Dr. Rath, summed up his ultimate view: "[Petitioner] may be understandably upset about being in jail but is grossly exaggerating any symptomatology he experiences, and comparison of materials indicates he is at times lying." *Id.*

(Rath Report of July 15, 1996). The trial court concluded after an initial competency hearing that Petitioner was competent.

The evidence available to the trial court is insufficient to rebut the state courts' determination - presumed correct under *Baal* - that Petitioner's subsequent behavior did not raise a "bona fide doubt" about his ongoing competency. Although Petitioner's behavior was arguably more disruptive than that of Amaya-Ruiz, the parallels between the two cases are persuasive. Like Amaya-Ruiz, Petitioner was diagnosed in a pretrial hearing as competent but malingering and uncooperative. Like Amaya-Ruiz, Petitioner worsened his disruptive and uncooperative behavior after that initial determination. Like Amaya-Ruiz, Petitioner points to his certainly disruptive and allegedly suicidal behavior, along with an extensive pharmacopeia of prescribed antipsychotic medication, as support for his claim that the trial court erred by not conducting another *Pate* hearing. Like the Ninth Circuit in *Amaya-Ruiz*, this Court finds such evidence insufficient to raise a bona fide doubt that Petitioner, previously diagnosed as competent and malingering, had become truly incompetent in the intervening months.

In denying this claim, the state courts thus neither acted in a manner contrary to federal law as determined by the Supreme Court nor unreasonably applied that law. Their decision also was not based on an unreasonable factual determination. Habeas relief is not justified. 28 U.S.C. § 2254(d).

IV.

PROCEDURAL DEFAULT OF REMAINING CLAIMS

Respondent argues that Petitioner's remaining claims are barred from federal habeas review because, Respondent asserts, the state courts' last explicated rejection of those claims rested upon procedural default. Under the procedural default

doctrine, when a petitioner fails to comply with the procedural rules of the state courts in presenting his claim for relief, he may not seek review of that claim in a subsequent federal habeas proceeding. *Ylst, supra*, 501 U.S. at 801. A district court properly declines to address the merits of a habeas claim where a petitioner has defaulted on the state's procedural requirements as to that claim, unless a petitioner is able to demonstrate cause for the default and resulting prejudice, or a fundamental miscarriage of justice. *Park v. California*, 202 F.3d 1146, 1151 (9th Cir. 2000).

A procedural default determination turns on the procedural history of the case and the peculiarities of the procedural rules particular to the state in question. *See O'Sullivan v. Boerckel* 526 U.S. 838, 843-46 (1999). Federal courts sitting in habeas must examine the basis of the relevant state court judgment and evaluate whether the state court's denial of the claim rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

A. Electric shock belt claim

Petitioner asserts that the trial court denied him due process by requiring him to wear a special belt, designed to inflict nonlethal electric shocks when a remote control is activated, as a condition of his appearing in court, after he had caused several prior disruptions. *See* Br. in Supp. of Petition at 2-16. (Citing a recent Ninth Circuit decision disapproving of the use of such belts in many instances, *Hawkins v. Comparet-Cassani*, 251 F.3d 1230 (9th Cir. 2001), Petitioner even sought to have this petition assigned to the same District Judge who presided over *Hawkins*.) As Petitioner acknowledges, the state courts rejected this claim on direct appeal, citing the lack of any objection at trial as a procedural bar to the claim's consideration. *Id.* at 14. Respondent contends that the state courts' disposition procedurally defaults the claim in this Court. The Court agrees.

The state Court of Appeal explained the claim further, and its rejection of the claim, as follows:

> . . . In particular, defendant contends that the belt constitutes a psychological restraint which impaired his right to be present and to communicate with counsel. Defendant additionally asserts that the court prejudicially erred because: (1) the belt was an unnecessary restraint (Pen. Code, § 688); (2) the court delegated the decision to use the belt to the sheriff's department; and (3) the court failed to consider the alternative of concealed leg braces.
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> Defendant refused to wear the belt and, thus, did not attend trial. In his petition, defendant cites additional evidence to show that he was afraid to wear the belt (1) because he knew another prisoner who had been accidentally shocked by the belt and (2) because defendant was taking medication that could have caused involuntary movements and subjected him to being shocked.
>
> None of defendant's arguments, or the evidence supporting them, was raised below. Although defendant refused to wear the belt, defense counsel did not object to its use. Therefore, defendant has waived the right to raise any such grounds on appeal and his habeas petition is procedurally barred. (*People v. Tuilaepa* (1992) 4 Cal. 4th 569, 583; *People v. Stankewitz* (1990) 51 Cal. 3d 72, 95, fn. 9; *People v. Duran* (1976) 16 Cal. 3d 282, 289; *People v. Garcia* [(1997) 56 Cal. App. 4th 1349,] 1356-1357.

Lodgment 1 at 7-8. The court went on to reject the claim on the merits as well. *Id.* at 8 ("Furthermore, the argument that the belt constituted a psychological restraint was rejected in the *Garcia* case."). Where a state court rejects a claim based not only on

the merits but also on procedural grounds, and where its reliance on the procedural bar is an independent and alternative basis for the rejection, federal habeas review is precluded. *Loveland v. Hatcher*, 231 F.3d 640, 643-44 (9th Cir. 2000). Thus, if California's stated procedural bar is independent and adequate, this Court must deny this claim unless a federal exception to default applies.

1. Independence.

For a state law ground to be "independent," it must not be interwoven with federal law. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In this case, the state courts cited only California cases, not federal cases or laws, barring appellate consideration of claims regarding trial conditions, such as shackling and restraints, where no corresponding objection was raised during trial. The rule is thus independent for procedural default purposes.

2. Adequacy.

For a state law ground to be "adequate" in the procedural default context, it "must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (citing *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991)). "The reason for these requirements . . . is that it is grossly unfair - and serves none of the purposes of respect for procedural rules - to forfeit an individual's constitutional claim because he failed to follow a rule that was not firmly established at the time in question." *Calderon v. Bean*, 96 F.3d 1126, 1129 (quotations and citations omitted), *cert. denied*, 520 U.S. 1204 (1997).

The authorities cited by the state Court of Appeal in support of its procedural default of this claim break no new ground in California. The state's rule barring appellate claims relating to shackling and similar security measures imposed upon a defendant, where defendant made no trial objection, had been in place for at least a decade when Petitioner defaulted at his trial. *See, e.g., People v. Walker*, 47 Cal. 3d 605, 629, 253 Cal. Rptr. 863, 876 (1982) (refusing consideration of shackling claim on appeal for failure to object at trial) (citing similar cases defaulting claims for lack of trial objection). Nothing suggests that the state's courts have not applied the rule consistently. Petitioner bears the burden of disproving adequacy by disproving a state's consistent application of default rules. *See Dugger v. Adorns*, 489 U.S. 401, 410 n.6 (1989) ("the few cases that [the petitioner] and the dissent cite as ignoring procedural defaults do not convince us that the Florida Supreme Court fails to apply its procedural rule regularly and consistently"); *see also Jimmy Swaggart Ministries v. California*, 493 U.S. 378, 397-99 (1990). Petitioner does not address this issue and thus has failed to carry his burden.

Thus, unless an exception applies, the electric-shock-belt claim is procedurally defaulted.

3. Possible federal exceptions to procedural default.

A federal court may excuse a petitioner's procedural default if the petitioner demonstrates either (1) that he has good cause for the default and has suffered prejudice due to the default, or (2) that declining to consider his federal claims will result in a miscarriage of justice. *Coleman v. Thompson*, *supra*, 501 U.S. at 730. Petitioner has not explained why he failed to interpose a legal objection to conditioning his trial attendance on his wearing of the electric shock belt. (On habeas, Petitioner characterizes his announcement in open court that "I'm not keeping this belt on," and his refusal to sign a form relating to

the belt's use, as tantamount to a legal objection. This Court rejects this view.) The Court thus does not consider the issue of prejudice.

Petitioner also has not shown that this Court's refusal to consider the defaulted claim will result in a miscarriage of justice. Specifically, Petitioner has not shown that a constitutional violation, now the subject of one of the defaulted claims, has probably resulted in the conviction of someone who is actually innocent of the crimes for which he stands convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992); *Coleman*, 501 U.S. at 749-50.

Accordingly, Petitioner's electric shock belt claim is procedurally barred.

B. Involuntary medication claim

As the state Court of Appeal explained in rejecting Petitioner's next claim on procedural grounds:

> . . . Maxwell argues that the trial court erred by not conducting a hearing to determine the need for the involuntary administration of psychotropic medication. (*Riggins v. Nevada* (1992) 504 U.S. 127, 135.) Defendant did not raise this issue below, possibly because one difficulty with the argument is the absence of any evidence that defendant was drugged by force. The only facts before the trial court were that defendant was refusing sometimes to take his medication. The unauthenticated medical records presented as evidence in support of the petition are inconclusive on this point. Maxwell's declaration states that he was forcibly administered Thorazine, but the medical records mention only Haldol and other drugs, not Thorazine. And the medical records

> do not state that Haldol and the other drugs were administered forcibly.
>
> This is not a case in which the record provides a basis on which to argue that defendant was denied due process because of the forced administration of drugs: "Assuming for the purpose of argument that a person who has not been judicially determined to be incompetent must furnish informed consent before being treated with antipsychotic drugs [citation], and assuming further that the state would bear the burden of proving such informed consent in the event the administration of such drugs were challenged, the state bore no such burden in the present case, because defendant did not raise the issue in the trial court." (*People v. Jones*, *supra*, 15 Cal. 4th at pp. 154-155.)
>
> On this issue, Maxwell's appeal and petition fail both procedurally and on the merits.

Lodgment 1 at 9- 10. The procedural bar upon which the state courts relied, as discussed in the *Jones* case – namely a bar against post-conviction claims regarding involuntary medication, where the claimant raised no trial objection - is "independent," in that it does not depend upon federal authorities. Petitioner also has not shown that it is not "adequate" by showing that it has been inconsistently or unpredictably applied in California. No exception for either cause and prejudice or a miscarriage of justice applies. The involuntary medication claim is thus procedurally defaulted.

C. Voluntary absence from trial

Petitioner claims the trial court violated his Fifth and Sixth Amendment rights to be present at trial by finding that he had voluntarily absented himself from trial. In support of this

claim, Petitioner points to "his diagnosed psychiatric state, the forced administration of antipsychotic medication and the order that he wear the stun belt as a condition of his presence at trial." Br. in Supp. of Petition at 17. Respondent contends that the state Court of Appeal, in rejecting the shock-belt claim on procedural grounds, also barred this factually overlapping claim:

> The finding of the California Court of Appeal that Petitioner's failure to object to the trial court's order for the REACT belt, subsumed the trial court's finding that Petitioner voluntarily absented himself from trial under . . . Cal. Penal Code § 1043. Thus, as with [the shock-belt claim], the decision of the California Court of Appeal constitutes a procedural bar to federal habeas review of this claim.
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> . . .
>
> Despite the [trial] court's findings [that Petitioner was faking incompetence and attempting to disrupt courtroom proceedings], Petitioner continued to be disruptive and stated he would not conform his conduct to that required in the courtroom. [Citation.] Thus, when ordering Petitioner to wear a REACT belt if he wanted to be present at trial, and after defense counsel and Petitioner indicated Petitioner did not want to be in the courtroom during trial, the court found Petitioner had given up his right to be present in the courtroom during that afternoon's proceedings. 1 RT 59 . . . . The court, however, continued to provide Petitioner with opportunities to conform his conduct and return to court. Petitioner, however, would not do so.
>
> Not only did the California Court of Appeal [bar the shock-belt claim on procedural grounds, but] the court also found, "None of defendant's arguments, or the evidence supporting them, was raised below." Lodgment 1 at 8. Petitioner's challenge of the trial

court's order that he voluntarily absented himself fiom trial under Cal. Penal Code § 1043 was one of those arguments. Lodgment 9 at ii, 32-33.

Answer at 10- 11.

The Court agrees. Petitioner essentially raised this claim, disputing the finding of voluntary absence, as part and parcel of his direct-appeal claim that it was unconstitutional to condition his presence in court on his donning of the REACT belt. As noted above, Petitioner is procedurally defaulted on the latter claim. Accordingly, he has procedurally defaulted on the voluntary absence claim as well. Given the close and inextricable relationship between the two, they are the same claim for practical purposes.

V.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that judgment be entered dismissing the petition with prejudice.

DATED: October 18, 2001

/S/

RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE